Office - Supreme Court, U.S.
FILED
MAR 16 1982
ALEXANDER L. STEVAS,

No. 81-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF NEW MEXICO, ex rel RICHARD ROCK,
Petitioner,

v.

HON. HARRY E. STOWERS, JR.,
Respondent.

Appeal From The Supreme Court Of The State Of New Mexico

MOTION TO DISMISS

LEO C. KELLY
Attorney for Real Party
in Interest
LILL, KELLY & BARR, P.A.
300 San Mateo N.E.
Suite 620
Albuquerque, New Mexico 87108
(505) 262-1905

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	Page
STATEMENT OF THE FACTS	1
STATEMENT OF THE CASE	2
ARGUMENTS AND AUTHORITIES	3
I. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY APPEALED	3
II. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL	5
A. The Status Of The Child As An Enrolled Member Of The Navajo Tribe Is Not Disturbed By Any Decision In The State District Court	5
B. Determintion Of Paternity In The State District Court Does Not Infringe Upon The Governmental Powers Of The Tribe	6
C. The Tribal Court Does Not Have Jurisdiction Over The Defendant Nor Does It Have Exclusive Jurisdiction Of The Subject Matter	8
CONCLUSION	11

TABLE OF AUTHORITIES

FEDERAL CASES:	Page
F.T.C. v. *Minneapolis-Honeywell*, 344 U.S. 206 (1952) ...	4
Matton Steamboat Co. v. *Murphy*, 319 U.S. 412 (1943) ...	4
United States v. *Candelaria*, 271 U.S. 432 (1925)	6
Williams v. *Lee*, 358 U.S. 217 (1959)	6
STATE CASES:	
Batchelor v. *Charley*, 389 P.2d 49, 74 N.M. 717 (1965) ..	10
Chino v. *Chino*, 90 N.M. 203, 561 P.2d 476 (1977)	7
Martinez v. *Martinez*, 157 P.2d 484, 49 N.M. 83 (1945) ..	10
Natewa v. *Natewa*, 84 N.M. 69, 499 P.2d 691 (1972)	6
State Securities, Inc. v. *Anderson*, 84 N.M. 629, 506 P.2d 786 (1973)	10
OTHER:	
Handbook of Federal Indian Law, University of New Mexico Press, 1958 Ed.	10
New Mexico Rules of Appellate Procedure, Rule 19(a)	4
28 U.S.C. Sec. 2101(c)	4
25 C.F.R. Sec. 11.22	9
25 C.F.R. Sec. 11.30	9
1 Navajo Tribal Code, Sec. 101	5
7 Navajo Tribal Code, Sec. 133	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1034

STATE OF NEW MEXICO, ex rel RICHARD ROCK,

Petitioner,

v.

HON. HARRY E. STOWERS, JR.,

Respondent.

Appeal From The Supreme Court Of The State Of New Mexico

MOTION TO DISMISS

Comes now Esther Antonio, the real party in interest, and moves the Court to dismiss the within-captioned appeal and as grounds therefor states:

I. The Federal Question Sought to be Reviewed was not Timely Appealed.

II. No Substantial Federal Question is Presented by the Appeal.

STATEMENT OF THE FACTS

Esther Antonio, Plaintiff below, is a Navajo Indian and citizen of the State of New Mexico. Richard Rock, Defendant below, is a non-Indian citizen of the State of New Mexico.

Esther Antonio filed suit against Richard Rock alleging that he is the father of her child Rachael Antonio, conceived in Albuquerque, New Mexico, and born in Albuquerque, New

Mexico on or about May 11, 1975. Antonio further alleges that Rock contributed to the support of Rachael from the date of her birth until shortly before she filed the paternity suit on April 4, 1979.

Richard Rock denies paternity.

STATEMENT OF THE CASE

All references to Exhibits are to the Partial Transcript of Proceedings lodged in the Supreme Court of the United States, a complete copy of which has been provided to the Petitioner.

Antonio filed her complaint against Richard Rock on April 4, 1979 (EXHIBIT A). Antonio filed a First Amended Complaint on August 30, 1979 (EXHIBIT B). Rock filed a Motion to Dismiss on September 7, 1979 (EXHIBIT C). That Motion was denied on December 14, 1979 (EXHIBIT D). Rock filed an Answer to First Amended Complaint on September 7, 1979 (EXHIBIT E).

Rock filed a Petition for Writ of Prohibition in the Supreme Court of New Mexico on December 14, 1979 (EXHIBIT F). The Supreme Court of New Mexico issued an Alternative Writ on December 19, 1979 (EXHIBIT G). Antonio filed an Answer to Writ of Prohibition on December 26, 1979 (EXHIBIT H). Rock filed a Brief in Support of Petition for Writ of Prohibition on January 10, 1980 (EXHIBIT I). Antonio filed an Answer to Brief in support of the Petition for Writ of Prohibition on January 21, 1980 (EXHIBIT J). By Order entered January 30, 1980 the Supreme Court of New Mexico quashed the Alternative Writ issued on December 19, 1979 (EXHIBIT K).

Rock filed another Petition for Writ of Prohibition in the New Mexico Supreme Court on April 17, 1980 (EXHIBIT L). An Alternative Writ was issued on April 23, 1980 (EXHIBIT M). Antonio filed an Answer to Petition for Writ of Prohibition on April 30, 1980 (EXHIBIT N). Rock filed a Petitioner's Brief in

Support of Petition for Writ of Prohibition on May 7, 1980 (EXHIBIT O). Antonio filed a Brief in Opposition to Petition for Writ of Prohibition on May 14, 1980 (EXHIBIT P). By order entered May 21, 1980, the New Mexico Supreme Court quashed the Alternative Writ previously granted on April 23, 1980 (EXHIBIT Q).

Rock filed yet another Petition for Alternative Writ of Prohibition in the New Mexico Supreme Court on October 15, 1980 (EXHIBIT R). The New Mexico Supreme Court issued an Alternate (sic.) Writ of Prohibition on October 22, 1980 (EXHIBIT S). Antonio filed a Response to Petition for Alternate Writ of Prohibition on October 28, 1980 (EXHIBIT T). Rock filed a Petitioner's Brief on November 5, 1980 (EXHIBIT U). Antonio filed a Brief in Opposition to Petition for Writ of Prohibition on November 12, 1980 (EXHIBIT V). By order entered November 19, 1980, the Supreme Court of New Mexico quashed the Alternative Writ previously issued on October 22, 1980 (EXHIBIT W).

Rock filed his fourth Petition for Writ of Prohibition in the Supreme Court of New Mexico on August 14, 1981 (EXHIBIT X). By order entered August 19, 1981, the New Mexico Supreme Court denied Rock's application (EXHIBIT Y). By order entered August 24, 1980, the New Mexico Supreme Court denied Rock's Request for a Stay of Proceedings (EXHIBIT Z).

On August 31, 1981, Rock filed a Notice of Appeal to the Supreme Court of the United States from the final order of the Supreme Court of New Mexico entered August 19, 1981 (EXHIBIT AA).

ARGUMENTS AND AUTHORITIES

I. The Federal Question Sought To Be Reviewed Was Not Timely Appealed.

Notice of Appeal to the Supreme Court of the United States was filed August 31, 1981. While Petitioner says he is appeal-

ing from the Order of the New Mexico Supreme Court entered August 19, 1981, he is in reality appealing from the Order of the Court entered January 30, 1980.

In his brief filed January 10, 1980, the Petitioner raised the same jurisdictional question he raised in his Petition for Writ of Prohibition filed August 14, 1981. Compare EXHIBIT I and EXHIBIT X.

The New Mexico Supreme Court requires Motions for Rehearing to be filed "within ten (10) days after entry of the Appellate Court's decision." Rule 19(a) New Mexico Rules of Appellate Procedure (EXHIBIT BB). Petitioner filed no such motion.

Time for appeal of the January 30, 1980 judgment to the United States Supreme Court ran on April 29, 1980. 28 U.S.C. Sec. 2101(c). Petitioner filed no Notice of Appeal from the judgment.

This Court addressed the situation in this case in *F.T.C.* v. *Minneapolis-Honeywell*, 344 U.S. 206 (1952) wherein it was said:

> "The test is a practical one. The question is whether the lower Court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality."

The judgment of August 31, 1981 plainly does not meet this test. Petitioner asked the New Mexico Supreme Court to do precisely the same thing he had asked it to do in January, and which the Court refused to do in its judgment entered January 30, 1980.

Litigation must at some point be brought to an end. *F.T.C.* v. *Minneapolis-Honeywell*, supra; see *Matton Steamboat Co.* v. *Murphy*, 319 U.S. 412, 415 (1943). Litigation of Petitioner's jurisdictional argument came to an end when he failed to appeal the New Mexico Supreme Court's judgment entered January 30, 1980.

II. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL.

A. The Status Of The Child As An Enrolled Member Of The Navajo Tribe Is Not Disturbed By Any Decision In The State District Court.

The New Mexico State District Court has jurisdiction over the subject matter and persons in the cause of action of Esther Antonio v. Richard Rock, No. DR-79-01505. It is a paternity action to determine the status of Richard Rock with respect to the minor child of Esther Antonio. The Petitioner-Defendant, Richard Rock is not an Indian. This action in no way affects the tribal membership of the minor child of Esther Antonio, a full-blood Navajo. Under the Navajo Tribal Code, the child has automatic tribal membership. Therefore, the rights and benefits which accrue to the child as a result of membership are not disturbed by a determination of paternity by the State District Court. 1 N.T.C. sec. 101 states:

> "The membership of the Navajo Tribe shall consist of the following persons: . . .
>
> (c) Children born to any enrolled member of the Navajo Tribe shall automatically become members of the Navajo Tribe and shall be enrolled, provided they are at least one-fourth degree Navajo blood."

The Child whose paternity is to be determined was born to an enrolled member of the Navajo Tribe. The child's membership is automatic. Tribal membership is not an issue in the instant proceeding. Because tribal membership is not an issue before the Court, jurisdiction over the paternity determination in no way infringes on tribal self-government. The State District Court will determine the nature of the support obligation of the Petitioner-Defendant to the minor child of Esther Antonio. Therefore, cases relied upon by the Petitioner which hold that the Tribal Court has jurisdiction with respect to membership questions, are not applicable here.

B. Determination Of Paternity In The State District Court Does Not Infringe Upon The Governmental Powers Of The Tribe.

Petitioner relies on cases and doctrines of Indian law which are not applicable to the instant case. The determination of paternity does not violate the infringement test put forth in *Williams* v. *Lee*, 358 U.S. 217, 79 S.CT. 269, 3 L.Ed. 251 (1959). The result of the determination of paternity will be to decide whether or not the putative father will be required to provide the child with financial support. Since the putative father is not Indian, tribal laws and tribal self-government are not affected. In *Natewa* v. *Natewa*, 84 N.M. 69, 499 P.2d 691 (1972), the Court states, in essence, that an Indian may not escape the responsibilities of child support payments by hiding on an Indian reservation. Similarly, obligations and responsibilities cannot be abandoned or avoided by a citizen of the State of New Mexico on the grounds that the beneficiary of the obligations is an Indian.

The determination of paternity of the child in this case in no way affects lands belonging to or set aside for Indians, the basis for the holding in *Chino* v. *Chino*, infra. It in no way affects the regulation of the internal affairs of the tribe, the basis for the holding in *Williams* v. *Lee*, supra. It may, however, provide benefits for the child which, as a matter of moral and social policy, will enhance her life. These benefits do not affect the rights and benefits afforded her as a consequence of her Navajo heritage.

In *United States* v. *Candelaria*, 271 U.S. 432, 64 S.Ct. 561, 70 L.Ed. 1023 (1925), the United States Supreme Court allowed states to exercise their authority in some cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized. The infringement test put forth by *William* v. *Lee*, supra, is applicable where the state action infringes on the right of reservation Indians to make their own laws and be ruled by them. State Court jurisdiction over a

paternity action where the mother is Navajo and the putative father is not an Indian in no way infringes upon the tribe's right to make its own laws and be governed by them.

In *Chino* v. *Chino*, 90 N.M. 203, 561 P.2d 476 (1977), the Court lists three criteria relevant to the determination of whether or not the application of State law would infringe upon the self-government of the Indians. These are (1) whether the parties are Indians or non-Indians, (2) whether the cause of action arose within the Indian reservation, and (3) the nature of interest to be protected. Here only one party is an Indian who does not reside within the exterior boundaries of the Indian reservation, the cause of action did not arise on Indian land, and the interests to be protected are those of the minor child with respect to her parentage and her right to financial support from the putative father. Jurisdiction in the State District Court over this cause of action is appropriate under *United States* v. *Candelaria*, supra, because tribal relations are not involved and the rights of Indians are not jeopardized.

Jurisdiction in the State District Court is appropriate because the right of the tribe to make laws and be governed by them is not infringed as it was in *Williams* v. *Lee*, supra. The cause of action in *Williams* v. *Lee*, supra, arose out of a contract entered into by an Indian with a non-Indian on reservation land. To hold that the State District Court has no jurisdiction over this cause of action under *Williams* v. *Lee*, supra, extends the infringement test beyond the scope of the holding in that case.

In *Chino* v. *Chino*, supra, the State District Court had no jurisdiction because the cause of action required a determination of Indian property rights with respect to property located within the boundaries of the reservation. The determination of paternity where the putative father is a non-Indian does not in any way require the determination of property rights within the reservation. *Chino* v. *Chino*, supra, is distinguishable not only on the facts, but also on the ultimate issue of State Court

jurisdiction over Indian property rights. The holding in *Chino* v. *Chino*, supra, has no application to the instant case, nor can there be a reasonable basis for its extension to determination of paternity.

C. The Tribal Court Does Not Have Jurisdiction Over The Defendant Nor Does It Have Exclusive Jurisdiction Of The Subject Matter.

Only the federal government can grant jurisdiction to Tribal Courts. Specifically 25 CFR sec. 11.22 states:

> "The Court of Indian Offenses shall have jurisdiction of all suits wherein the *defendant* (emphasis added) is a member of the tribe or tribes within their jurisdiction, and all other suits between members and non-members by stipulation of both parties . . . "

The language states that Tribal Court jurisdiction exists where the Defendant is an Indian. Richard Rock is the Defendant, but he is not an Indian. Therefore, the Tribal Court does not have jurisdiction absent a stipulation by both parties. There is no such stipulation here.

The language of 25 CFR sec. 11.22 was construed by the New Mexico Supreme Court in *State Securities, Inc.* v. *Anderson*, infra. The Court held that this section confers original but not exclusive jurisdiction to the Tribal Court:

> "We believe that 25 CFR sec. 11.22 and Title 7 of the Navajo Tribal Code, sec. 133, confer original but not exclusive jurisdiction. There are two important reasons. First providing Indian courts with exclusive jurisdiction in every action where an Indian is a Defendant would be establishing abnormal jurisdiction, both in terms of what is presently exercised by other governmental units in the United States and what is necessary to achieve justice." at page 787.

Thus, even where the defendant is Indian, the Tribal Court does not have exclusive jurisdiction in all instances. Petitioner seeks

a holding to grant exclusive jurisdiction to the Tribal Court where the defendant is not an Indian and the Cause of action does not affect tribal self-government. Under *State Securities, Inc.* v. *Anderson*, infra, such a grant of exclusive jurisdiction over a non-Indian would "establish abnormal jurisdiction."

As a second important reason for not establishing exclusive jurisdiction in the Tribal Court, the Court in *State Securities, Inc.* v. *Anderson*, infra, states:

> ". . . Even the United States Supreme Court construing the words 'absolute jurisdiction and control,' has decided that 'absolute federal jurisdiction' is not invariably exclusive jurisdiction." (citations omitted.)

The Petitioner, by seeking exclusive jurisdiction in the Tribal Court, is attempting to create a jurisdictional base in the Tribal Court more extensive than that granted by the federal government. Congress has exclusive power to regulate the Indian tribes. It has not conferred exclusive jurisdiction upon the Indian Courts. "Congress has therefore not prohibited jurisdiction by State Courts." *State Securities, Inc.* v. *Anderson*, infra, at pages 787-788.

In the matter before the Court, State Court jurisdiction does not interfere with Indian self-government. Here jurisdiction in the State Court is appropriate for the same reasons as the Court held in *State Securities, Inc.* v. *Anderson*, infra.

> "We believe that state jurisdiction is proper in cases between Indians and non-Indians involving contractual obligations incurred off the reservation . . ." (page 789).

Petitioner asserts that 25 CFR sec. 11.30 grants exclusive jurisdiction to Tribal Courts with respect to a paternity action. The language in 25 CFR sec. 11.30 is the same as the language in 25 CFR sec. 11.22, interpreted by the Court in *State Secur-*

ities, Inc. v. *Anderson*, 84 N.M. 629, 506 P.2d 786 (1973). Section 11.30 states in part:

> "The Court of Indian Offenses shall have jurisdiction of all suits . . . "

This same language is used in 25 CFR sec. 11.22 and is a grant of general jurisdiction. It was held in *State Securities, Inc.* v. *Anderson*, supra, not to be an exclusive grant of jurisdiction. Similarly, 25 CFR sec. 11.30 cannot be construed to be a grant of exclusive Tribal Court jurisdiction. Jurisdiction is concurrent.

Petitioner asserts that this Indian Plaintiff cannot avail herself of the State Courts. New Mexico cases have repeatedly held that Indian citizens are not to be denied access to State Courts. *Batchelor* v. *Charley*, 389 P.2d 49, 74 N.M. 717 (1965), *Martinez* v. *Martinez*, 157 P.2d 484, 49 N.M. 83 (1945). Felix Cohen said, in his *Handbook of Federal Indian Law*, University of New Mexico Press, 1958 Ed., at page 379:

> "In matters not affecting either the federal government or tribal relations, an Indian has the same status to sue and be sued in State Courts as any other citizen."

Even the most recent federal legislation with respect to Indians, the Indian Child Welfare Act of 1978, grants not exclusive, but concurrent jurisdiction to the State and Tribal Courts *unless* (emphasis added) the parent objects. When a parent does object to Tribal Court jurisdiction, any action under the Indian Child Welfare Act of 1978 can be tried in the State Courts. Thus, Congressional intent is not to lock an Indian Plaintiff into the Tribal Court, but to allow the Indian citizen a choice of forums. The Plaintiff, Esther Antonio, has chosen to bring her cause of action in the State Court. She should not be denied access to the State Court.

CONCLUSION

This case was not timely appealed to the Supreme Court of the United States and the appeal should be denied for lack of jurisdiction.

In the event the Court disagrees with respondent's jurisdictional argument, the Court should find that State Court jurisdiction is appropriate in this cause of action for the determination of paternity of the minor child of Esther Antonio. The Navajo Tribal Code affords this child automatic tribal membership because she was born to a full-blooded Navajo Indian. The determination of paternity will not disturb the status of the child with respect to the Navajo Tribe. Therefore, no tribal self-government is infringed upon. The issue before the State District Court is whether or not Richard Rock is the father of the child and will therefore be required to provide financial support.

The facts are that Richard Rock is not an Indian and that this cause of action arose outside the exterior boundaries of the Indian reservation. These two facts distinguish this case from those cases which have granted Tribal Court jurisdiction. Where the cause of action arose on Indian land and/or the defendant is Indian, Tribal Court jurisdiction is appropriate. This is not such a case, and the New Mexico District Court has jurisdiction over the plaintiff, the defendant and this cause of action.

Respectfully Submitted,

LILL, KELLY & BARR, P.A.

LEO C. KELLY
Attorney for Respondent
620 Two Park Central Tower
300 San Mateo, NE
Albuquerque, New Mexico 87108
Telephone: (505) 262-1905